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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 74-5257

Dennis Wayne McDonald ..... *Petitioner*

V.

The State of Arkansas,
A.L. Lockhart, Superintendent,
Cummins Unit, Arkansas
Department of Correction, et al ..... *Respondents*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT
IN OPPOSITION

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Req. No. A42230 50 Copies

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	3
Argument	5
Conclusion	11

CITATIONS

CASES	Page
Gaines v. Washington, 227 U.S. 81	10
Hurtado v. California, 110 U.S. 516	10
Moore v. State, 229 Ark. 335	10
Sibron v. New York, 392 U.S. 40	5
Whitely v. Warden of Wyoming Penitentiary 401 U.S. 560	5

STATUTES

Page

Ark. Stat. Ann. §41-3403 7

Ark. Stat. Ann. §43-1708 9

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is attached to the Petition as an appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

(1) Whether the circumstances of petitioner's arrest constitute a violation of his constitutional rights.

(2) Whether petitioner's constitutional rights were violated by the denial of his motion for a new trial.

(3) Whether the sentence imposed constitutes "cruel and unusual punishment" in violation of the Constitution of the United States.

(4) Whether petitioner's physical appearance at trial constituted a violation of his constitutional rights.

(5) Whether petitioner's constitutional rights were violated by the circumstances of his legal representation at trial.

(6) Whether petitioner's constitutional rights were violated by the circumstances of his pre-trial incarceration.

(7) Whether petitioner's trial on the sworn information of a prosecuting attorney constituted a violation of his constitutional rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner invokes the provisions of Ark. Stat. Ann. §41-3403, 28 U.S.C. 2254 and the Fourth, Eighth and Fourteenth Amendments to the Constitution of The United States.

STATEMENT

Petitioner was convicted of first degree rape in the Circuit Court of Miller County, Arkansas on November 22, 1971 and sentenced to thirty (30) years imprisonment. Two motions for a new trial were denied.

The Supreme Court of Arkansas affirmed the conviction on appeal in a decision reported as *McDonald v. State*, 253 Ark. 812, 491 S.W.2d 36.

Petition for rehearing was denied by Arkansas' highest court on March 5, 1973.

Petitioner filed a Petition For Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Western District of Arkansas. A hearing was held on the Petition on November 7, 1973. Relief was denied and the petition dismissed by an Order filed December 17, 1973. That opinion is signed by Judge Paul X. Williams and is attached to the petition herein as an appendix.

Petitioner appealed this dismissal to the United States Court of Appeals for the Eighth Circuit and the cause was argued orally by both parties on April 18, 1974 in St. Louis, Missouri.

The Court of Appeals affirmed the judgment of the District Court on August 5, 1974 and the mandate of that court was issued.

Certiorari is sought to review the decision of the Court of Appeals.

The circumstances of petitioner's arrest, trial and motions for post-conviction relief are adequately set forth in the petition and while respondents will refer to various facts in the course of their argument, it is not deemed necessary to reiterate the details at this point.

ARGUMENT

I.

PETITIONER'S ARREST AND THE SUBSEQUENT SEARCH OF HIS PERSON WERE CONSTITUTIONALLY VALID.

The circumstances of the petitioner's arrest, as set out in the petition and in the opinion challenged herein, are undisputed. The police officers reported to the scene in response to the victim's phone call that she had been raped. McDonald, who fit the description that had been radioed to the officers, was observed running down the sidewalk away from the scene. He was restrained by the officers and subsequently searched. The search revealed property which the victim had previously reported stolen by the rapist.

The precise moment of arrest is, of course, a question of fact. *Sibron v. New York*, 392 U.S. 40 (1968). It is clear that the officers had ample probable cause for the arrest and subsequent search. Dispite the petitioner's allegation that the arrest and search were constitutionally invalid, supporting case law is lacking. For instance, petitioner's cited case of *Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560 (1971) hardly stands for the proposition that a radio bulletin cannot constitute sufficient probable cause. In that case, officers were merely advised of the existence of a warrant which was subsequently discovered to be inadequate. In the case at bar the radio bulletin reported the commission of a crime and the description of a suspect. Clearly the petitioner's arrest was valid on the basis of that report and his observation by officers as he ran from the scene.

The Court of Appeals properly decided this point against the petitioner.

II.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE DENIAL OF HIS MOTION FOR A NEW TRIAL.

Petitioner complains that he should have been granted a new trial in state court on the basis of "newly discovered evidence" outlined in the petition. Two evidentiary hearings on petitioner's motions were held, in January and May of 1972, in the Arkansas trial court. That court, the Supreme Court of Arkansas, and both lower Federal Courts concluded that the allegations of the petitioner were "flimsy and inconclusive".

The respondents agree with this conclusion and cite the court to a passage contained in petitioner's argument:

> "Although the evidence of her sexual misconduct was subsequent to petitioner's trial, it is intuitively obvious that she engaged in such misconduct prior to the trial also."

If such "evidence" is held sufficient to mandate a new trial, the finality of criminal convictions will be subject to serious question.

III.

THE SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

At petitioner's trial the prosecuting witness testified that McDonald raped her forcibly at knife point. McDonald was tried under Ark. Stat. Ann. §41-3403 and convicted of first degree rape. As noted in the petition, the thirty year sentence imposed represented the statutory minimum sentence. Petitioner has failed to demonstrate that this sentence is constitutionally excessive.

IV.

THERE WAS NO ERROR IN TRYING McDONALD WHILE HE HAD LONG HAIR.

There is not a single word in the record to indicate that anyone other than McDonald was responsible for his physical appearance at the time of trial. There is no evidence that McDonald requested a hair cut much less that he was denied the services of a barber.

Further, there is no evidence whatsoever that the jury was prejudiced by McDonald's appearance. As previously noted, McDonald received the minimum sentence for the crime charged.

Absent an allegation that McDonald requested a hair cut or shave, or evidence that prejudice resulted from McDonald's appearance, petitioner's fourth point must be held to be without merit.

V.

THE TRIAL COURT DID NOT ERR IN REFUSING TO DISMISS McDONALD'S APPOINTED COUNSEL.

Counsel was appointed to represent McDonald in August of 1971. The trial date of November 22nd was set by the court on November 1st. On the date that trial was to commence McDonald informed the Judge that he was dissatisfied with his court-appointed attorney because the attorney had suggested to him, McDonald, that he consider negotiating a guilty plea.

The court denied McDonald's request but appointed a second attorney to assist the first. Clearly such action was within the trial court's discretion. Petitioner has never alleged, and does not allege here, that he was prejudiced by the court's decision or that his representation was ineffective.

Petitioner's point five is without merit.

VI.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE CIRCUMSTANCES OF HIS PRE-TRIAL INCARCERATION.

Petitioner notes that he was held 73 days between the date of his arrest and a preliminary hearing, and that he was held in jail for five months before the time of his trial. Petitioner alleges that "an obvious prejudice" resulted because a material witness was in Germany and "unable to attend".

Ark. Stat. Ann. §43-1708 reads in its entirety as follows:

> "If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner."

Petitioner has wholly failed to demonstrate that he was denied a speedy trial, that he was not brought to trial within two terms of court, or that prejudice resulted from the alleged delay. Petitioner fails to indicate what the "material witness" would have testified and does not explain why the witness was not present.

Respondents must also point out that the "five month delay" issue was not raised in District Court and that the Court of Appeals very properly refused to consider the contention on that basis.

Absent a demonstration of prejudice, petitioner's point number 6 is without merit.

VII.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY HIS TRIAL ON THE SWORN INFORMATION OF THE PROSECUTING ATTORNEY.

Petitioner's seventh point reads in its entirety as follows:

> "Petitioner's rights under the fourteenth amendment were violated because no grand jury indictment was returned against him in state court, and he was forced to stand trial on the basis of an information only."

It does not appear that this point was considered by either the District or the Circuit Court. Respondents therefore contend that the point is not properly before this Honorable Court.

Respondents also note that the challenged procedure has been held constitutional many times in the past. See constitution of Arkansas, Amendment 21; *Hurtado v. California*, 110 U.S. 516; *Gaines v. Washington*, 227 U.S. 81; *Moore v. State*, 229 Ark. 335.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari is wholly without merit and should be denied.

Respectfully submitted,

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